

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 20, 2008

MATTHEW R. HAKODA v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2004-C-2098 Steve Dozier, Judge

No. M2007-00973-CCA-R3-PC - Filed July 2, 2008

The petitioner, Matthew R. Hakoda, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief from his nolo contendere plea to arson and resulting six-year sentence. On appeal, he contends that he received the ineffective assistance of counsel and that he did not enter his plea knowingly and voluntarily. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Ryan C. Caldwell, Nashville, Tennessee, for the appellant, Matthew R. Hakoda.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Amy H. Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the petitioner's guilty plea hearing, the State gave the following factual account of the crime: In September 2003, the petitioner's wife obtained an order of protection against him. In September, October, November, and December 2003, the petitioner violated the order numerous times by going to his wife's home and driving up and down the street where she lived. On the night of December 12, 2003, the petitioner's wife returned home from work. After she and her two children went to bed, she heard a loud "boom" and noticed smoke coming through the vents in the house. The petitioner's wife and her children got out of the house and telephoned 9-1-1. The fire department responded and extinguished a fire inside the home. Police investigating the scene found mail addressed to the petitioner strewn about neighbors' yards. They also found a bag in a neighbor's yard containing items from the home, including the petitioner's Titans cap and the

couple's marriage certificate. An insurance company investigation revealed that the fire was started by a container of accelerant that had been placed in a crawl space. On December 15, 2003, the petitioner once again violated the terms of the order of protection by going to his wife's residence. On January 28, 2004, the petitioner solicited someone to murder his wife and was jailed. A jury convicted the petitioner of three counts of solicitation of first degree murder as a result of the petitioner's soliciting a fellow jail inmate to murder his wife and her two children, and the trial court sentenced him to twenty-nine years in confinement. See State v. Matthew R. Hakoda, No. M2005-01864-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 774, at *2 (Nashville, Sept. 21, 2006). This court affirmed those convictions. See id. at *30.

The record reflects that the petitioner originally was charged with aggravated arson in the instant case, a Class A felony. He pled nolo contendere to arson, a Class C felony, and agreed to a six-year sentence to be served concurrently with the twenty-nine-year sentence he received for his solicitation convictions. Subsequently, he filed a motion to withdraw his guilty plea, which was denied by the trial court, and a petition for post-conviction relief from his arson conviction. The post-conviction court appointed counsel, and counsel amended the petition, alleging that the petitioner received the ineffective assistance of counsel because trial counsel failed to interview important witnesses, failed to subpoena defense witnesses, failed to hire an investigator, and failed to investigate his case fully. The petition also alleged that the petitioner's plea was unknowing and involuntary because he was forced to plead guilty due to counsel's lack of preparation for trial and unresponsiveness to his case.

At the evidentiary hearing, the petitioner testified that he retained an attorney to handle his solicitation and arson cases. The petitioner alleged that after he was sentenced for the solicitation convictions, counsel met with him one time for about one hour to discuss the arson case. During the meeting, they discussed the facts of the case and counsel told him that "it would be a real tight case . . . as far as not being a lot to possibly appeal on, if it went to trial." The petitioner was "[n]ot quite sure" if he and counsel discussed potential witnesses who could testify at trial. The petitioner had wanted counsel to subpoena several people and question potential witnesses. However, to the petitioner's knowledge, counsel did not subpoena or question anyone and did not hire an investigator. The petitioner also had wanted counsel to collect his ex-wife's medical records. When the State made a plea offer, counsel told the petitioner that counsel would not get any of the information he requested because the prosecutor had offered the petitioner "a good deal" and he should accept it. Counsel told the petitioner that if he did not accept the offer, he would be sentenced to fifteen to twenty years to be served at one hundred percent and that he would serve the sentence consecutively to his twenty-nine-year sentence. The petitioner had wanted to go to trial. However, he did not believe he had any choice but to accept the State's offer because counsel was not prepared for a trial. Counsel did not explain to the petitioner the consequences of his guilty plea or how the guilty plea could affect him if this court ordered a retrial for his solicitation convictions.

On cross-examination, the petitioner testified that he did not give counsel any money to hire an investigator. He stated that he did not recall asking the trial court during his plea hearing what the consequences of his guilty plea would be if he were to be retried for solicitation of first degree

murder. On redirect examination, the petitioner testified that counsel never requested money for an investigator.

The post-conviction court filed a written order ruling on the petitioner's petition for post-conviction relief. Regarding the petitioner's contention that he received the ineffective assistance of counsel, the post-conviction court noted that the petitioner failed to have any potential defense witnesses testify at the evidentiary hearing and "failed to prove any factual allegation by clear and convincing evidence that his counsel was ineffective." Regarding the petitioner's claim of an unknowing and involuntary guilty plea, the post-conviction court referred to the guilty plea hearing transcript and noted that the petitioner asked to review his plea petition and then stated that no one was forcing him to plead guilty. The court denied the petitioner's request for post-conviction relief.

II. Analysis

The petitioner claims that he received the ineffective assistance of counsel because his trial attorney failed to investigate his case properly. He also contends that he was forced to plead guilty because counsel failed to prepare for trial and because counsel failed to inform him that his conviction could be used against him if his solicitation convictions were overturned on appeal. We conclude that the post-conviction court properly denied the petition for post-conviction relief.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of

attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Moreover, in the context of a guilty plea, “the petitioner must show ‘prejudice’ by demonstrating that, but for counsel’s errors, he would not have pleaded guilty but would have insisted upon going to trial.” Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998); see also Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

To pass constitutional muster, a guilty plea must be made voluntarily, understandingly, and knowingly. Hicks, 983 S.W.2d at 246 (citing Boykin v. Alabama, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969)); see also State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977). To determine the voluntariness and intelligence behind a guilty plea, the court must look to various circumstantial factors, i.e.,

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Initially, we note that trial counsel testified at the hearing on the petitioner’s motion to withdraw his guilty plea and that the petitioner has included a transcript of the hearing in the appellate record. At the motion hearing, trial counsel testified that she explained to the petitioner what would happen if he were convicted and that “he wanted to take the offer.” Nevertheless, when the issue is ineffective assistance of counsel, the State should have counsel testify at the hearing on the petition. See State v. Craven, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982); State v. Hopson, 589 S.W.2d 952, 954 (Tenn. Crim. App. 1979). In any event, even without counsel’s testimony at the post-conviction evidentiary hearing to contradict the petitioner’s claims, the petitioner has failed to establish by clear and convincing evidence that he was prejudiced by the action or inaction of trial counsel. The petitioner testified that counsel met with him only one time, failed to interview or subpoena witnesses, and failed to obtain his ex-wife’s medical records. However, counsel had already represented the petitioner on his charges for solicitation to commit murder, a case closely linked to the arson case. Moreover, the petitioner did not present any of the witnesses or evidence at the post-conviction hearing. Generally, “[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We may not speculate on what benefit the witnesses or evidence may have offered for the defense. Id. Accordingly, the petitioner has failed to demonstrate prejudice.

As to the petitioner’s claim that he was forced to plead guilty by counsel’s unresponsiveness to his case, we note that at the guilty plea hearing, the trial court asked the petitioner if he was

satisfied with counsel's representation, and the petitioner stated, "I have to be today." The trial court responded, "Well, no, you don't. I mean, we can have -- leave this set for trial." The petitioner responded that he wanted to continue with the hearing and plead nolo contendere. The post-conviction court reviewed the guilty plea hearing transcript and obviously concluded that the petitioner had not wanted to go to trial. Given that the petitioner had already been convicted of three counts of solicitation of first degree murder, was serving a twenty-nine-year sentence for those convictions, and was facing an additional sentence of fifteen to twenty-five years to be served at one hundred percent for aggravated arson, it was reasonable for counsel to advise the petitioner to accept the State's offer and for the petitioner to plead guilty in order to avoid a much harsher punishment that could have resulted from a trial. We conclude that the petitioner knowingly and intelligently pled guilty.

Finally, although the petitioner claims that his guilty plea was unknowing and involuntary because counsel never informed him that his conviction could be used against him, our review of the guilty plea hearing transcript reveals that the trial court informed him that the conviction could be used to impeach him if he were retried on his other charges. Therefore, we affirm the judgment of the post-conviction court.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE